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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 1170

LOUIS FINKELSTEIN and LOUIS SCHAEFFER,
Petitioners,

against

THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1962

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TO THE SUPREME COURT OF THE UNITED STATES:

Louis Finkelstein and Louis Schaeffer pray that a writ of certiorari issue to reiew the judgment of the Court of Appeals of the State of New York entered on May 17, 1962. This single petition is filed because the cases were tried together, the record on appeal is joint, the judgment and opinions below are joint, and the questions are closely related.

Citation of Opinions Below.

The opinions of the Court of Appeals of the State of New York are not reported. They are appended herewith.

The Appellate Division did not render an opinion. The opinion of the trial term is reported in 28 Misc. 2d 771 (218 N. Y. S. 2d 341) and appears in the Record, page 57.

Jurisdiction.

The judgment of affirmance by the Court of Appeals which is sought to be reviewed was made and entered on May 17, 1962.

The jurisdiction of this court is invoked under 28 U. S. C., §§1257 and 2101 on the ground that the Court of Appeals decided this case in a way not in accord with the applicable decisions of this court.

Questions Presented for Review.

As to petitioners Finkelstein and Schaeffer.

1. Whether or not the doctrine of *Smith v. California*, 361 U. S. 147, requires that the prosecution prove knowledge by the accused of the *obscene character* of the book alleged to be obscene, as distinguished from knowledge of the contents of such publication.

2. Whether or not the failure of the respondent to prove that petitioner knew the contents of the publication to be obscene violated petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether the proof offered by the respondent and received by the Trial Court was sufficient knowledge of the *contents* of the publication under the doctrine of the *Smith* case and adequately protected petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States.

As to petitioner Schaeffer only.

4. Whether or not Section 1141, Penal Law of New York, in so far as it seeks to proscribe publications made

up of stories "sexually morbid," "grossly perverse," "bizarre" or "digusting" material does not offend the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

5. Whether or not the provisions of said Section 1141, with respect to its strictures against stories sexually morbid, grossly perverse, bizarre and disgusting are not vague and uncertain, and offend the due process requirements of the Fourteenth Amendment.

6. The publications are not obscene and therefore are protected by the Constitution.

7. Section 1141 is vague and uncertain and therefore offends the requirements of due process in that the "pruriency" test does not provide a method for determining whether a publication is proscribed.

8. The petitioner was charged in an information that did not charge him with having sold the publications with knowledge of their contents and thus, did not comply with the requirements of *Smith v. California*, 361 U. S. 147.

9. The petitioner was denied the opportunity to prove "community standards" in connection with the charge that the books were obscene, in violation of the Constitution.

10. Whether the subsequent reversal of the conviction of petitioner in which the Court of Appeals construed Section 1141 for the first time so as to require proof of scienter and remanding the case for a new trial on that issue is an *ex post facto* prosecution of the petitioner, in violation of the Constitution.

Importance of This Case.

This case involves several issues that have not heretofore been passed upon by this Court.

In *Smith v. California*, 361 U. S. 147, this Court made the observation (p. 154): "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."

This petition brings before the Court the issues thus left open. It raises two points: 1) what elements in the proof are sufficient to sustain a conclusion of knowledge of the contents; and 2) is proof of knowledge of the contents sufficient or must there be additional proof that the accused knew such contents to be obscene.

Another novel question raised by petitioner Schaeffer is whether a state, without offending the First and Fourteenth Amendments, may proscribe publications that deal with publications that are sexually morbid, grossly perverse, bizarre or "disgusting" matter (cf. *Manual Enterprises v. Day*, cert. granted, October Term 1961, No. 123, involving a publication on homosexualism). A subsidiary novel question is whether those terms are not such vague and indefinite terms as would place them within the ambit of the strictures of *Winters v. New York*, 333 U. S. 507.

Provisions of the Constitution of the United States in Point.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State, wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions Involved:

Section 1141, Penal Law (pertinent parts):

"SECTION 1141. OBSCENE PRINTS AND ARTICLES:

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story, paper, writing, * * *

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or to be fined not less than one hundred fifty dollars, nor more than two thousand dollars or both fine and imprisonment for the first offense * * *

The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit purient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

Manner in Which Federal Questions Sought to be Reviewed Were First Raised.

The federal questions sought to be reviewed were raised at the trial in the first instance (ff. 68, 127, 140, 144). They were rejected by the Trial Court (ff. 127, 153, 169). They were again raised in the Court of Appeals and are covered in its opinion.

Statement of Facts.

SCHAEFFER: A detective entered a bookstore in New York, N. Y., where Schaeffer was a clerk. He purchased two books "Queen Bee" and "Garden of Evil" from that clerk.

FINKELSTEIN: The petitioner was convicted for having had in his possession, as owner, of another store in New York, N. Y., obscene books entitled, "Queen Bee" and "Garden of Evil."

Decisions Below.

The Court of Special Sessions rendered a judgment convicting the petitioner on both counts. It wrote an opinion which appears in the Record, page 57.

The Appellate Division affirmed the judgment without opinion.

The Court of Appeals affirmed the convictions by a vote of 5-2, with four (4) opinions.

Arguments Relied on for Allowance of Writ.

(1). Actual knowledge by petitioners must be established.

In *Smith v. California*, 361 U. S. 147, this Court held that a valid conviction for obscenity must be supported by a statute in which knowledge by the defendant of the contents of a book is made a necessary element of proof.

There is no proof that the petitioners knew the contents of the books. The Court of Appeals relied solely on the cover of the books, the price stamped on the cover and on the testimony of the arresting officer that the petitioner in each case (incredible as it is) said that he had seen worse books.

It is submitted, that this evidence does not satisfy the requirement of the *Smith* case that proof of actual knowledge must be established.

The fact that a defendant upon his arrest made a statement disavowing the guilty character of a publication is no proof that he was familiar with the contents of the book. Disavowals at such times are commonplace and automatic.

Moreover, to accept the bare statement of an officer to such acknowledgment without proof of actual knowledge would provide a ready tailored technique in the hands of the police for defeating what *Smith* requires.

The cover of a book or price has no significance in proving the contents of the book *as a whole* as *Roth v. United States*, 354 U. S. 476, instructs.

(2). There was no proof that petitioners knew the publications to be obscene.

This Court in *Smith* held that it is necessary that a *mens rea* in the accused be established. This unescapably means that not only must it be shown that the accused knew the contents, but also knew they were obscene. Lacking such requirement, no evil state of mind can be imputed. This was recognized by this Court in *Smith* (p. 152), "by penalizing booksellers even though they had not the slightest notice of the *character* of the books they sold" and again (p. 154) "falsely deny reason to suspect their *obscenity*."

Justice Black, in concurrence, said (p. 156) "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book *even though he is unaware of its obscenity*." And Justice Frankfurter, also concurring, noted (p. 161) "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity*."

Thus, this Court made knowledge of the *character* a publication a factor in the crime.

There is no proof here that petitioners had such knowledge.

(3). The prosecution rested on a statute and its construction that is vague and indefinite.

The petitioner Schaeffer was charged with a crime in that he unlawfully did possess with intent to sell, lend, give away, distribute and show certain obscene, lewd, lascivious, filthy, indecent, and disgusting books entitled "Garden of Evil" and "Queen Bee."

The Court of Appeals held that the books were bizarre, sexually morbid and grossly perverse. It thus construed the statute to condemn books of that nature. *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 587.

It is thus charged and construed by the Court of Appeals that they were obscene and also that they were sexually morbid, grossly perverse, a bizarre and "disgusting" books. Under the rule in *Stromberg v. California*, 283 U. S. 359 and *Winters v. New York*, 333 U. S. 507, such grouping must lead to a reversal if it is found that the petitioner could be innocent on any one of the charges, because from the record it cannot be ascertained on which theory he was found guilty. For instance, in *Winters* the defendant was charged with selling a publication made up of stories of crime, bloodshed and lust. It was held by this Court that the inability to ascertain which vice was definitely ascribed to the publication required a reversal and dismissal of the entire information.

The petitioner Schaeffer urges that if it be shown that he could not be successfully charged with selling sexually morbid, grossly perverse, bizarre or "disgusting" publications, the judgment of his conviction cannot be supported, because the Trial Court may have weighed the petitioner's guilt on any one of those claimed vices, one of which may be untenable.

In *Roth v. United States*, 354 U. S. 476, this Court held that the constitutionally permissible scope of "obscenity" was limited to such publications that appealed to prurient interests by the standards of the average person in the community. A book may be sexually morbid, grossly perverse, bizarre and "disgusting." Does that give it qualities that appeal to prurient interests of the average person? Instead of stimulating his prurient interest, it may disgust him, repel him or bore him.

Only those publications that stimulate to lust and pruriency may be proscribed by statute. Other publications, lacking even social utility, have the protection of the Constitution. *Winters*, page 510. Thus, in *Winters* the publication was made up of stories of lust, bloodshed and crime. Yet this Court held them protected, even though their charged vices fitted the language of the statute. It followed that the statute was thus rendered infirm. Likewise, must it follow here for the group of vices sexually morbid, grossly perverse, bizarre and "disgusting" can be paired with "bloodshed," "crime" and "lust." *One, Inc., v. Oleson*, 355 U. S. 371; *Manual Enterprises v. Day*, October Term, 1961, No. 123, certiorari granted.

(4). The words "sexually morbid," "grossly perverse," "bizarre" and "disgusting" are vague and indefinite.

Like "bloodshed," "crime" and "lust" in *Winters*, these adjectives suffer from vagueness. They cannot inform a publisher or book vendor what is or what is not forbidden.

Even if the definitions are taken in their sex connotations, the infirmity of vagueness appears as it did in *Winters*. Literature of all kinds deals with the sexually morbid, grossly perverse, bizarre and the disgusting.

(5). The "pruriency" test of "obscenity" should be reexamined by this court.

It is submitted that the test of "obscenity" as stated in *Roth* needs re-examination, since the appeal to "pruriency" is as vague and as indefinite as "obscenity" itself.

(6). The books are not obscene.

They may be revolting, sickening or disgusting as was stated by the various courts through which these cases have travelled. But those characteristics do not render them "obscene" in the sense of arousing to lust. On the contrary, the possession of such characteristics would act as a repellant, erotically. They may be a bore or an emetic.

(7). The petitioner was deprived of his opportunity to prove community standards.

The petitioner sought to prove by the prosecution's witness that other books of a similar nature were being sold throughout the city over a long period of time and sought to place those publications in evidence as a basis of comparison. This was refused by the Trial Court. The two dissenting Judges in the Court of Appeals, Judges Dye and Fuld, thought that this exclusion rendered the judgments infirm. The separate opinions of the Judges who concurred in the Court's decision also placed emphasis on this aspect of the case.

The standard for comparison should have been allowed, because this is one of the best ways of proving what the community is reading and what is being tolerated. *Smith, supra.*

(8). The information was defective because it did not charge the petitioner Schaeffer with knowledge of the contents of the publications.

This omission is sought to be excused by reason of a construction of the statute by the Court of Appeals in the first appeal of these cases to it. 9 N. Y. 2d 342. The information then, as again in this case, gave no notice of the essential factor that the *Smith* case required.

Moreover, the subsequent reversal of the convictions by the Court of Appeals for a new trial in order to afford the defendants an opportunity to explain away scienter did not cure the deficiency of the information. All it did was produce a second trial of this petitioner as a sacrificial guinea pig to supply what the Legislature deliberately omitted (see dissenting opinion of Judge Van Voorhis in the first appeal).

Thus, the petitioner was tried under an *ex post facto* law. *Calder v. Bull*, 3 Dallas (U. S.) 386. One prejudice to petitioner is that he had no fair warning of proscribed conduct, against whose hazards he might have protected himself. A similar situation arose in the *Winters* case when this Court on an order for re-argument (91 L. Ed. 1873), requested counsel to argue what effect, on due process, was the initial construction of the statute made by the Court of Appeals. This Court in its decision did not decide that issue because it assumed that the defendant had been apprised of the charge. But in doing so, this Court noted that *Lanzetta v. New Jersey*, 306 U. S. 451, holds that a conviction cannot stand against a defendant who was caught in the net of a *new* construction, which gathered him into it.

CONCLUSION.

The petition for a writ of certiorari should be granted.

May 22, 1962.

Respectfully submitted,

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HA 2-1023.

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Remittitur. May 17. 1962.

COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of May in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur May 17, 1962

THE PEOPLE, &c.,

Respondent,

vs.

LOUIS FINKELSTEIN and LOUIS SCHAEFFER,

Appellants.

BE IT REMEMBERED, That on the 15th day of February in the year of our Lord one thousand nine hundred and sixty-two, Louis Finkelstein and Louis Schaeffer, the appellants in this cause, came here unto the Court of Appeals, by Emanuel Redfield, their attorney, and filed in the said Court Notices of Appeal and return thereto from the judgments of the Appellate Division of the Supreme

Court in and for the First Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it is also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,

Albany, May 17, 1962.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Seal

RAYMOND J. CANNON
Clerk.

Opinions.

COURT OF APPEALS,

STATE OF NEW YORK.

FROESSEL, J.:

After a joint trial, each of the defendants was convicted of the crime of violating section 1141 of the Penal Law, which in relevant part provides:

> "A person who sells * * * or has in his possession with intent to sell * * * any obscene * * * book * * * [i]s guilty of a misdemeanor."

When these cases were before us last year, we held that said section 1141, subdivision 1, required proof of *scienter*, and, thus construed, the statute is not violative of the Constitution of the United States (*People v. Finkelstein*, 9 N. Y. 2d 342). We reversed the convictions and ordered new trials, however, "so that, although the People have the burden of proof, defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale" (*Id.* at 346).

At the new trial, the only witness was Detective John Dell. He stated that at about 2 P. M. on December 30, 1958, he entered the Times Square Book Bazaar and observed defendant Schaeffer at a cash register. Dell found on a shelf a copy of a book entitled "Queen Bee" and a copy of a book called "Garden of Evil." Dell showed the books to Schaeffer and inquired as to their cost. The latter replied they were $5.00 each, but he could buy them both for $9.00. Dell purchased the books, and thereupon placed Schaeffer under arrest. Dell's subsequent search revealed 70 copies of "Garden of Evil" and 40 of "Queen

Bee" under the counter. He told Schaeffer, who had identified himself as manager of the store, that the "books were pornographic," to which the latter replied, "I have seen much worse than these."

At about 2:20 P. M. on the same afternoon Dell entered a bookstore at 251 West 42nd Street. A Mr. Kleinberg (since deceased) was standing on a platform near the cash register. On a shelf Dell found copies of "Garden of Evil" and "Queen Bee." Kleinberg told the detective he could purchase them for $9.00. Dell did so and placed Kleinberg under arrest. Presently defendant Finkelstein entered the store and identified himself as its owner. Dell told him, "You know those two books are pornographic," to which defendant replied, "It all depends on how you look at it. I have seen much worse than this." Dell arrested Finkelstein, and his search revealed about 7 copies of "Garden of Evil" and 8 copies of "Queen Bee."

Defendants neither testified nor called any witness in their behalf. They chose instead to rely on points of law raised by motions to dismiss the informations, and motions addressed to the proof. The three judge Special Sessions bench unanimously denied all motions, and found defendants guilty as charged. In its opinion, the court found, among other things, that the books were "in fact, 'hard-core pornography'" as defined in our recent decision in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, and that each defendant possessed the requisite knowledge regarding the books he sold. The Appellate Division unanimously affirmed the convictions without opinion.

Both defendants presently contend that the proof fails to establish *scienter*. In our opinion, however, *scienter*—"knowledge by * * * [defendants] of the contents of the book[s] (*Smith v. California*, 361 U. S. 147, 149)—was sufficiently proven beyond a reasonable doubt. As the

Supreme Court of the United States said in *Smith v. California*, *supra*, at 154.

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

The voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the covers, the $5.00 selling price boldly stamped on the front cover of each paper-covered book, taken together, warranted the trial court's conclusion that *scienter* was established beyond a reasonable doubt.

While Finkelstein challenges only the proof regarding *scienter*, Schaeffer urges several additional points for reversal. With regard to his claims that section 1141 is unconstitutional, and that the information is insufficient because it does not charge *scienter*, both points were decided to the contrary in the previous appeal (*People v. Finkelstein*, 9 N. Y. 2d 342; see *Winters v. New York*, 333 U. S. 507, 520).

Schaeffer next urges that he was prosecuted under an *ex post facto* law adopted by this court on the previous appeal. The simple answer to this contention is that we did not legislate *scienter* into section 1141; rather we interpreted that section to be "instinct with the idea of *scienter*" (*People v. Finkelstein*, 9 N. Y. 2d at 344). We noted, morover (at pp. 345-346), quoting from *Winters v. New York*, *supra*, 333 U. S. 507, 514, that defendant "can be charged 'with knowledge of the scope of subsequent interpretation.'"

Schaeffer's contention that the books involved are not obscene is untenable. Having made "an independent constitutional appraisal" of the books (*People v. Rich-*

mond County News, Inc., supra, 9 N. Y. 2d 578, 580), we find ourselves in agreement with the courts below that the books are definitely obscene. (*Id.*; *Roth v. United States*, 354 U. S. 476.) Each book contains descriptions of sexual experiences, with emphasis on the abnormal. They focus "predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification" (*People v. Richmond County News, Inc., supra*, 9 N. Y. 2d 578, 587). In short, they are muck for muck's sake, and *nothing* more.

Finally, Schaeffer suggests that the trial court erred in refusing to receive evidence allegedly bearing upon current community standards regarding obscenity. On cross-examination of Detective Dell, counsel established that during the year preceding defendants' arrest Dell had seen copies of certain other named publications in bookstores and on magazine stands in New York City. Counsel offered a book and magazines in evidence "to indicate to your Honors what is the current standard in the community, of literature, and by comparing them you will see whether or not they are permissible."

In our opinion, the proffered evidence was properly excluded, as it was irrelevant to the issue of whether or not the two books sold by defendants in this case were obscene. The fact that certain other and different publications were seen in bookstores and on magazine stands in New York City is no indication that they were sold, or read, or that to the average person applying contemporary community standards (*Roth v. United States, supra*) they were not obscene.

The judgments of conviction should be affirmed.

DESMOND, Ch. J. (concurring):

I join in Judge Froessel's opinion for affirmance but I would go further.

I would hold that the alleged error in refusing to accept evidence as to the sale of other publications was not presented either to the Appellate Division or to this court. Defendant Finkelstein mentioned no such matter in his brief in either court. Defendant Schaeffer at one point in his brief in each court included in a list of alleged issues that: "The court refused to accept evidence of community standards." However, this "issue" was not only not argued in the Schaeffer brief in the Appellate Division or in this court but was not otherwise mentioned in either brief. The prosecutor, finding in defendants' briefs no further presentation of the "point," paid no attention to it.

If the question were before us I would agree with Judge Froessel that there was no error. These books were abscene by any conceivable objective test and it could not be a defense to their sale, or otherwise relevant, that some other publications of vaguely similar content were being sold at other shops in New York City. All three opinions of this court in *People v. Richmond County News* (9 N. Y. 2d 578) seem to agree that if a publication is on its face and without doubt obscene its sale may be punished criminally regardless of how many other people sell it or buy it. Judge Fuld's opinion in *Richmond County News* tells us that the test of the obscene "is not in the tendency or appeal of the material, but rather in its content objectively appraised" (p. 587). The concurring opinion for reversal in that case says that a conviction may stand if the book or magazine includes "the extreme form of gross and all-intentioned sexuality which American statutes and courts may constitutionally punish as criminal" and that "The in-

quiry for the court, therefore, is whether the publication is so entirely obscene as to amount to 'hard-core pornography'" (p. 589). The dissenting opinion in *Richmond County News* refers (p. 592) to "material which all would concede is shockingly and unquestionably obscene" and "which the average person would unhesitatingly condemn as obscene and lewd." The writers of those three opinions were all saying the same thing, that is, that there are publications so vile that no contemporary standards anywhere could justify them. The same thought was expressed by the United State Supreme Court's opinion in *Kingsley Books v. Brown* (354 U. S. 436, 440) where the court referred to "the primary requirements of decency" and to booklets "incontestably found to be obscene." Where there is conclusive proof of the sale of that sort of thing by one who knows what he is selling it is absurd for the court to take proof from either party of other sales of other dirty books by other vendors.

In borderline or arguable cases there may be a right in prosecution or defense, or both, to use testimony of qualified persons but I assume we are leaving that question open despite what appears to be a holding of this court in 1884 in *People v. Muller* (96 N. Y. 408, 412) that opinion evidence is not receivable on an issue of obscenity or no. First Amendment considerations, so exhaustively litigated in recent years in obscenity cases, were not even mentioned in the *Muller* opinion and the constitutional and other aspects of the law of obscenity has been extensively revised in the intervening years.

I would vote to affirm.

VAN VOORHIS, J. (concurring):

In ascertaining what are contemporary community standards, I agree with Judge Dye that other books and publications may be compared which are currently sold by book stores to the public. This aspect was considered in *Smith v. California*, 361 U. S. 147, in the concurring opinions of Justice Frankfurter and Harlan. Justice Frankfurter stated:

> "Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity (*Roth v. United States*, 354 U. S. 476, 489), it surely must be rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit or miss, subjective view of what they are believed to be by the individual juror or judge * * *.
>
> For the reasons I have indicated, I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions." (*Id.* at 164-167.)

Justice Harlan, after stating his agreement with Justice Frankfurter, added:

> "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process 'using that term in its primary sense of an opportunity to be heard and to defend [a] * * * substantive right,' * * * requires a state to allow a litigant in some manner to introduce proof on this score. * * *

> However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion evidence by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance."

The American Law Institute's model Penal Code, tentative draft No. 6 [1957], §207.10 (2), provides to the same effect.

In my view the other publications offered in evidence might well have been admitted for whatever aid they might have supplied to the Court in discerning what are contemporary community standards, but this is also a subject of judicial notice. As stated in 9 Wigmore, Evidence, 3rd ed., §2567, at page 535:

> "That a matter is judicially noticed means merely that if is taken as true without the offering of evidence by the party who would ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But, the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable. It is true that occasionally a court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary; but usually this is in truth laying down a new rule of substantive law by declaraing certain facts immaterial";

The practice is not uncommon of taking evidence concerning matters within the realm of judicial notice so as to furnish the judicial mind with more exact details of

general knowledge which judges are presumed to know already, the contents of an almanac, for example (*Case v. Perew*, 46 Hun 57, affd. 122 N. Y. 665).

In my view it is open to a court to examine other books and publications than those subject to the criminal charge to inform itself concerning what are contemporary community standards. An examination of the two publications which were offered and excluded leads to the conclusion that they would not have altered the determination that the material involved in this prosecution is obscene. Consequently their exclusion was not prejudicial, with the consequence that the judgment of conviction should be affirmed.

Dye, J. (dissenting):

I agree that in each case the information is sufficient to state a violation of Penal Law, §1141, within the meaning of our prior decision, *People v. Finkelstein* (9 N. Y. 2d 342), and that on the retrial the proof adduced by the People was sufficient to impose upon the defendants the burden of going forward to overcome it.

I cannot agree that the convictions should stand.

When the defendants attempted to meet their burden by offering proof that other books and magazines of similar content were being freely and openly sold, and this according to the People's witness Dell, in many other stores in the community, for the purpose of affording a basis of comparison for determining permissibility of sale, the court summarily rejected the offer as improper and irrelevant.

In so ruling, it is quite clear that contemporary community standards were not considered in arriving at the verdict. It may well be that such offer, if allowed, would

not have changed the court's conclusion as to the obscene character of the books involved, but even so that does not warrant closing the door on a possible defense. The criminality of the act was thus "made to depend upon whether a [judge] may think it reasonable" (*Tozer v. United States*, 52 F. 917, 919; *People v. Firth*, 3 N. Y. 2d 472). The trial judges "establish[ed] a standard of their own to be used as a basis to render the section possible of execution" (*United States v. Cohen Grocery Co.*, 255 U. S. 81, 91).

Even if I were to assume *arguendo* that the court below took judicial notice of the contemporary standards of the community, I would agree with Justices Frankfurter and Harlan of the United States Supreme Court that the First and Fourteenth Amendments to the United States Constitution require a trial court "to allow light to be shed on what those 'contemporary community standards' are" (*Smith v. California*, 361 U. S. 146, 165, concurring opinion; see 9 Wigmore, Evidence [3rd ed.], 2567. The rulings of the trial court take on even greater significance when it is recognized that under the prevailing law in this State (see *People v. Muller*, 96 N. Y. 408) expert testimony is likewise inadmissible in an obscenity prosecution. The summary exclusion by the court of relevant evidence against the charges for the reason that "* * * that is not the way standards are made" deprived these defendants of the fair trial to which they were entitled. Such exclusion had the effect of barring all evidence relating to community standards. At the very least, they should have been allowed to lay a basis for comparison. The rulings, as made, rendered these convictions constitutionally defective (*Smith v. California, supra*), since "the community cannot, where liberty of

speech and press are at issue, condemn that which it generally tolerates" (*Smith v. California, supra*).

I dissent and vote to order a new trial as to each defendant.

Judgments affirmed. Opinion by Froessel, J., in which Burke and Foster, JJ., concur and in which Desmond, Ch. J., and Van Voorhis, J., concur in separate opinions. Dye, J., dissents in an opinion in which Fuld, J., concurs.